

ARKANSAS SUPREME COURT

No. CR 06-1364

GREGORY M. SMALL
Petitioner

v.

STATE OF ARKANSAS
Respondent

Opinion Delivered January 11, 2007

PRO SE MOTION FOR BELATED
APPEAL OF ORDER [CIRCUIT
COURT OF POLK COUNTY, CR 2003-
43, HON. J. W. LOONEY, JUDGE]

MOTION GRANTED.

PER CURIAM

In 2004, petitioner Gregory M. Small was found guilty by a jury of rape, attempted rape, and sexual assault in the second degree. An aggregate sentence of 492 months' imprisonment was imposed. The Arkansas Court of Appeals affirmed. *Small v. State*, CACR 04-1390 (Ark. App. Jun. 22, 2005).

Petitioner subsequently timely filed in the trial court a *pro se* petition for postconviction relief pursuant to Criminal Procedure Rule 37.1. On February 28, 2006, the court explained in a letter to petitioner and the prosecuting attorney that the petition had been denied on certain grounds. A copy of the letter was filemarked by the circuit court on March 2, 2006, but the court did not enter its order on the petition until May 1, 2006. Petitioner now seeks by *pro se* motion to proceed with a belated appeal of the May 1, 2006, order.

A petitioner has the right to appeal an adverse ruling on a petition for postconviction relief under Rule 37. *Scott v. State*, 281 Ark. 436, 664 S.W.2d 475 (1984) (*per curiam*). With that right,

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January 11, 2007

however, goes the responsibility to timely file a notice of appeal within thirty days of the date the order was entered in accordance with Ark. R. App.–Civ. 4(a). If the petitioner fails to timely file a notice of appeal, a belated appeal will not be allowed absent a showing by the petitioner of some good cause for the failure to comply with proper procedure. *Garner v. State*, 293 Ark. 309, 737 S.W.2d 637 (1987) (*per curiam*).

Petitioner states that he did not receive a copy of the May 1, 2006, order until September 1, 2006. Rule 37.3 (d) provides that the circuit clerk must promptly provide the petitioner with a copy of the court's order when it is entered. This court will grant a belated appeal if the petitioner contends that the clerk failed to comply with Rule 37.3 (d), and it cannot be determined from the record or other proof that the order was promptly forwarded to the petitioner. *Chiasson v. State*, 304 Ark. 110, 798 S.W.2d 927 (1990) (*per curiam*); *Porter v. State*, 287 Ark. 359, 698 S.W.2d 801 (1985) (*per curiam*).

The record here does not reflect that the clerk mailed a copy of the order to petitioner in time for him to file a timely notice of appeal, and the State did not file a response to the motion for belated appeal with any proof that the order was promptly mailed to petitioner. Accordingly, the motion for belated appeal of the May 1, 2006, order is granted. Our clerk is directed to lodge the appeal record and set a briefing schedule.

Motion granted.